No. 80720-5

SUPREME COURT
OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE, and the marital community composed thereof,

Appellant/Cross-Respondent,

v.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondent/Cross-Appellant.

AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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I. IDENTITY OF AMICI CURIAE

Okanogan County Deputy Sheriff's Guild and Yakima Police Patrolman's Association are seeking status as amicus curiae in support of a Petition for Review filed by the Kitsap County Deputy Sheriff's Guild. Amici, respectively, are each parties to separate cases pending in Superior Court which are directly affected by the Court of Appeals ruling.

II. COURT OF APPEALS DECISION

The proposed amici curiae seek to support this Court's review of *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, No. 34321-5-II, published at 165 P.3d 1266 (2007).

III. ARGUMENT

A. Summary of Argument

The Court of Appeals erred by apparently assuming, without analysis, that untruthfulness by law enforcement personnel constituted some type of *per se* disqualification from employment, sustaining arguments made by Kitsap County that *Brady v. Maryland* would lead to such disqualification. Besides the County's failure to ever make such an argument before the arbitrator, this is an odd conclusion because *Brady* is simply a rule of discovery and not admissibility, let alone job qualification.

The amici are filing in support of this Petition because they each have a direct stake in the outcome of the Guild's appeal in that they each have cases pending involving public policy challenges to what they believed were final and binding arbitration decisions. Under *Kitsap County,* the finality of these decisions has been questioned.

B. This Court should accept Review Because the Court of Appeals Decision deviates from a large body of case law regarding the admissibility of truthfulness allegations.

This case concerns the application of *Brady v. Maryland* and its effect on the tenure of law enforcement personnel.[1] According to *Brady* principles, the prosecution must disclose evidence that is material to either the guilt or the punishment of the accused.[2] Evidence which would impeach a government witness must be disclosed.[3]

The La France arbitrator considered the evidence, and decided that "the Employer failed to show by clear and convincing evidence that the penalty was appropriate...."[4] This was just not a dischargeable offense. Indeed, the Arbitrator declined to even find that any untruths uttered by La France were even willful misstatements, leaving open and not resolving

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[1] *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Court of Appeals, without full discussion, assumed that *Brady* principles barred the continued employment of Deputy LaFrance. The Court of Appeal's assumptions about how *Brady* impacts tenure were entirely misplaced.
[2] *Paradis v. Arave*, 130 F.3d 385 (9th Cir. 1997).
[3] *See United States v. Wong,* 78 F.3d 73 (2d Cir. 1996).
[4] Petition for Review (herein "Petition") at Appendix C (Award at 45).

the question of whether La France's mental health problems interfered with his fact reporting abilities.

Both the County and, again, apparently, the Court of Appeals, seem to misapprehend the relevance of *Brady* and its impact on actual case prosecution. Even if *disclosable* under *Brady,* and CrR 4.7(a)(3) and CrRLJ 4.7(a)(3) which codify it, and even if a defendant may be entitled to the *disclosure* of exculpatory evidence, evidence is not automatically *admissible* or subject to extensive use at trial.[5] At most, *Brady* requires *disclosure* of the fact that Deputy La France was found to have been untruthful in four matters in 2000-2001. If the County believes it is obligated to make this disclosure then it should do so. Nothing in *Brady* requires more, certainly not the loss of La France's employment. Where the County, and apparently the Court of Appeals, stumbled was in assuming that *disclosed* data was *per se admissible.* Nothing could be further from the truth.

The *admissibility* of evidence is controlled by the Rules of Evidence. Under those rules, specifically ER 404, evidence of a witnesses' character or character traits is generally *not* admissible to show that the witness acted in conformity with them on another occasion, like in

their testimony, unless permitted by ER 404(a).[6] ER 404(a)(3), entitled "Character of Witness," the only relevant section, refers readers to Rules 607, 608 and 609.[7]

In turn, ER 608, again the only rule on point, would *not* require admission of these specific allegations.[8] By contrast, Rule 608(a) expresses the traditional view that the credibility of a witness may be attacked by evidence of their reputation as an untruthful person. Reputation among a limited group of persons may not accurately reflect a witnesses' general character for truthfulness and may be excluded.[9]

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[5] *See* King County Prosecuting Attorney's Office *Brady* Committee Protocol (herein "Protocol"), as attached to the Cline Declaration in Support of the Petition as Exhibit A.

[6] Evidence of other crimes, wrongs, or acts is *not* admissible to prove character as a basis for suggesting that conduct on a particular occasion was in conformity with it. ER 404(b). The evidence may, however, be offered for another purpose such as proof of motive or opportunity. The court must determine whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors. Slough & Knightly, Other Vices, Other Crimes, 41 IOWA L. REV. 325 (1956). Previous Washington law is in accord. *See State v. Whalon,* 1 Wn.App. 785, 464 P.2d 730 (1970). Aronson, THE LAW OF EVIDENCE IN WASHINGTON (herein "Aronson") at § 404.02, § 404.02 Task Force Comment 404 (2004).

[7] ER 404(a)(3). "Rule 404 is concerned only with the admissibility of character as substantive evidence.... The issue should not be confused with the admissibility of character for purposes of impeachment, governed by Rules 608 and 609." Tegland, Courtroom Handbook on Washington Evidence, WASHINGTON PRACTICE 2004 (herein "Teglund") at 212. Rule 607 provides only that the credibility of a witness may be attacked by any party, and is irrelevant to our concerns here. Similarly, ER 609 is concerned with the rules regarding impeachment by evidence of the conviction of a crime, and is therefore beyond these comments.

[8] ER 608 governs the impeachment of a witness by evidence of a poor reputation or by specific instances in a witness' past.

[9] *Id; State v. Lord,* 117 Wn.2d 829, 822 P.2d 177 (1991), adhered to, 123 Wn.2d 296, 868 P.2d 835 (1994), opinion clarified, 123 Wn.2d 737, 870 P.2d 964 (1994).

Nevertheless, this is rare, and it is certainly not what we have here. Instead, Deputy La France has a reputation for honesty used by the County in many prosecutions, both in his career and in the community. Even the arbitrator found that the behavior alleged was "bizarre" as far back as the spring of 2000, and aberrant enough to have been recognized by "almost any other supervisor" prior to January 2001.[10] Then the Deputy was found fit for duty three times and returned to active duty.[11] Under these circumstances, it is virtually impossible to prove that Deputy La France has a reputation for dishonesty.

ER 608(b) is equally inapplicable. As Aronson notes:

> "This section ... gives the court discretion to allow inquiry on cross examination into specific instances of conduct bearing upon the credibility of the witness. ... [T]he general rule appears to be that acts of misconduct not the subject of a prior conviction have not been admissible for impeachment purposes. ... "[A] witness may not be impeached by showing specific acts of misconduct."[12]

Yet, the Rule allows inquiry into specific instances *only* when those instances demonstrate a *general* disposition for truthfulness or

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[10] Petition at Appendix C (Award at 44).
[11] The first examination was made by Dr. John E. Hamm (a blackened copy of his report is attached as Exhibit 7 to the Aufderheide Declaration in the Superior Court, CP 835-865); The last two examinations occurred after the arbitration and were each passed as well. Bonneville Affidavit in the superior Court, CP 711-834 at ¶11.
[12] Aronson, THE LAW OF EVIDENCE IN WASHINGTON at § 608.02

untruthfulness.[13] If the witness denies the specific instance on cross-examination, the inquiry is at an end.[14] Thus, it would be difficult if not virtually impossible to go anywhere with a direct attack on Deputy La France's credibility.[15] The risk of impeachment, if any theoretically exists, is very small.[16]

It is a huge leap to conclude that *Brady automatically* disqualifies Deputy La France from employment.[17] Even if the County were able to demonstrate in a subsequent arbitration hearing that La France was so

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[13] Tegland at 294. The cross-examiner must "take the answer" of the witness and may not call a second witness to contradict the first answer. This rule is designed to prevent time-consuming litigation over issues that are only collateral to the merits of the case. *United States v. Adams,* 799 F.2d 665 (11th Cir. 1986).

[14] *State v. Mak,* 105 Wn.2d 692, 718 P.2d 407 (1986). Having challenged the witness, the witness may explain the circumstances. *Id.*

[15] The generality that he had been untruthful would simply be denied. The specific instance that he has once received a reprimand for untruthfulness might get in but could be readily explained. Either way, the inquiry would be over.

[16] Protocol at 2 attached to the Cline Declaration in Support of the Petition as Exhibit A. The Protocol of the King County Prosecutor as to *Brady* issues corroborates our contention that *Brady* allegations do not automatically result in the *admissibility* of the allegations. As indicated, the King County Prosecutor's Office indicates that it will "strenuously" oppose admission of what it believes to be inadmissible character evidence, even where its interpretation of its *Brady* obligations requires disclosure of the underlying evidence.

[17] The *Brady* rule would merely require – assuming it even applies – the disclosure of instances of lying. Whether any impeachment of specific instances would be admissible in court would be subject to a later determination. In this case, no finding of lying was adopted. If a court were to allow the impeachment, it would still not be a bar to La France's ability to testify. Furthermore, even if one is less valuable to the state as a witness, the degree to which that affects his tenure should not be the subject of a post-hearing judicial attack. Such a question can only be decided under the labor contract's just cause standard, subject to binding and final arbitration. The County's attenuated reasoning about *Brady* principles does not warrant bypassing the due process protections required by the labor contract. Kitsap County apparently convinced the Court of Appeals of the erroneous notion that *Brady* disclosure would be fatal to Deputy La France's

fundamentally damaged that he was of no value to the state, that conclusion would not lead inexorably to his discharge. La France has due process rights that require that he be discharged only after established just cause.

Judgments about how a specific employee will perform after reinstatement, if given a lesser sanction, are nothing more than an exercise of the arbitrator's broad authority to determine appropriate punishments and remedies.[18] This rule is supported by the significant societal interest in the rehabilitation of workers who err in the workplace.

Moreover, the Court of Appeals erred by supplanting its judgment for the arbitrator's as to the nature and magnitude of Deputy La France's missteps. It was well within the discretion of the Arbitrator to reinstate La France. Final and binding arbitration has long upheld this standard.[19]

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employment. Assumptions are no substitute for proof. What is entirely absent in the Court of Appeals decision is any explanation as to why this would be so.

[18] *See United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38, 108 S. Ct. 364, 372, 98 L. Ed. 2d 286 (1987)); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960) (general proposition that courts must allow an arbitrator to use his "informed judgment . . . to reach a fair solution of a problem" is "especially true when it comes to formulating remedies").

[19] *See E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17,* 531 U.S. 57, 62, 69, 121 S. Ct. 462, 148 L. Ed. 2d 354, (2000) ("'But as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" quoting *Misco, supra*); *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731,* 990 F.2d 957, 960 (7th Cir. 1993) ("Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party. Rather, reviewing courts ask only if the arbitrator's award 'draws its essence from the collective bargaining agreement'") (quoting *Enterprise Wheel, supra* at 597));

Furthermore, *Kitsap County did not even make Brady contentions before the arbitrator.*[20] The broad remedial authority conferred upon arbitrators in final and binding labor arbitration should not be modified by vague standards of public policy where reinstatement does not explicitly violate positive law.

C. This Court Should Accept Review Because the Court of Appeals Decision Involves Questions of Substantial Public Interest which is demonstrated by the immediate impact it is having upon the Amici.

Amici are concerned with the Court of Appeals decision for an even more practical reason – each of them has a case pending directly affected by the Court of Appeals ruling. One amicus, the Yakima Police Patrolman's Association, has even had an arbitration award overturned where the court cited "public policy" and the *Kitsap County* case as a basis for its refusal to enforce the Award.[21]

Meanwhile, amicus Okanogan County Deputy Sheriff's Association, has a case pending involving reinstatement of an officer

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Richmond, F. & P. R.R. v. Transp. Communications Int'l Union, 973 F.2d 276, 282-83 (4th Cir. 1992).

[20] There were no *Brady* charges made to justify the proposed discharge, nor *Brady* allegations before the Arbitrator in the arbitration.

[21] Hester Declaration in Support of Petition (herein "Hester Declaration") at ¶¶2-3. What is perhaps more troubling is that the arbitrator concluded that the discharge of the officer was unlawful because it was motivated by the Chief's own unlawful discrimination — which itself would presumably be a violation of public policy. Hester Declaration at ¶8. Thus, the *Kitsap County* decision is being invoked to excuse the unlawful conduct of employers through its vague "public policy" exception.

arrested for driving under the influence of alcohol.[22] Part of the employer's discharge decision, besides the alleged DUI conduct, involved allegations that the Deputy made false statements to the arresting State Trooper while drunk.[23] The arbitrator reinstated,[24] and makes the rather common sense observation that individuals are not always *responsible*, nor was this officer, for statements made while intoxicated.[25] Despite the fact that the issue involves off-duty conduct, and a finding by the arbitrator, who weighed the whole case, that there was no *willful* untruthfulness, the employer relies upon the *Kitsap* decision to refuse to abide by the arbitrator's ruling.

These employer challenges indicate that this situation is getting out of control. Ultimately, such public policy should be defined by the Legislature. The Court of Appeals erred by not articulating a well-defined public policy standard grounded in existing law.[26] The Legislature has often deferred to "final and binding" arbitration.[27] It is hard to imagine a

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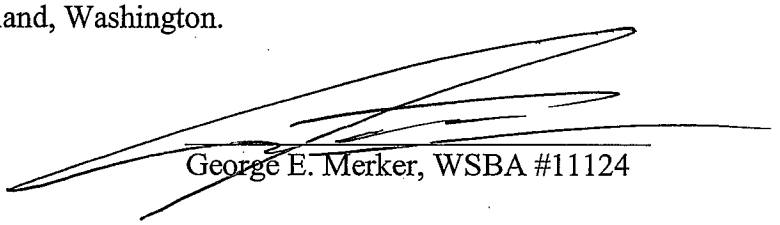
[22] Newport Declaration in Support of Petition (herein "Newport Declaration") at ¶3.
[23] *Id.*
[24] Newport Declaration at ¶2.
[25] They may lack the volition to form intent, and those statements are therefore *unintentional* for purposes of the employer's rules. These are questions of fact uniquely to be weighed by an arbitrator.
[26] RCW 43.101.010(7).
[27] Furthermore, the Legislature has elected to specifically respect the binding role of labor arbitration. *No decertification proceeding will be held where the arbitrator orders the reinstatement of the terminated officer. See* RCW 43.101.010, *et seq.* As this Court has held: "In the absence of an error of law on the face of the award, the arbitrator's award

more compelling indication that the Legislature has not supported free ranging judicial re-examination of the just cause determinations of labor arbitrators. To the extent that public policy must somehow be granted in express statutory law, the Legislature has indicated that only a very narrow set of circumstances, none of which are presented here, would bar reinstatement of officers found worthy of reinstatement by a final and binding arbitration decision.

IV. CONCLUSION

For all the stated reasons, this Court should grant the Petition for Review filed by the Kitsap County Deputy Sheriff's Guild.

RESPECTFULLY SUBMITTED this 31st day of December, 2007, at Bainbridge Island, Washington.



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will not be vacated or modified." *Davidson v. Hensen,* 135 Wn.2d 112, 954 P.2d 1327 (1998). As the *Davidson* court continued: "Phrased in a different way, judicial review of an arbitration award ... is exceedingly limited." *Davidson supra,* 135 Wn.2d at 119. *Labor* arbitrations are not subject to the arbitration act. *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 846, 991 P.2d 1161, 163 LRRM 2654 (2000); *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 152, 634 P.2d 296 (1981). To the extent that the Legislature has ever adopted any public policy concerning the misconduct of law enforcement officers, it has declined to indicate that this type of conduct is grounds for discharge from employment. For instance, the State Legislature has adopted a law enforcement officer certification program which defines circumstances in which officers might be decertified, and thereby no longer be eligible for Washington police employment. But that statute excludes most non-criminal and off-duty misconduct, including off-duty untruthfulness (other than crimes of untruthfulness such as perjury) from its scope of disqualifying conduct. *Id.*

CERTIFICATE OF SERVICE

I, Debora G. Pettersen, Legal Assistant to George E. Merker, declare that I served the Amicus Memorandum in Support of a Petition for Review to the Supreme Court of the State of Washington to which this Certificate of Service is attached in the following manner to each of the entities below listed:

Clerk, Supreme Court 415 12th Ave SW PO Box 40929 Olympia, WA 98504-0929	[ ] Via Facsimile [ ] Via U.S. Mail [X] Via Legal Mssngr [ ] Email
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I certify and acknowledge under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 2nd day of January, 2008.

Debora G. Pettersen